No. 87-574

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANTHONY J. DeCINTIO,

Petitioner,

v.

WESTCHESTER COUNTY MEDICAL CENTER;
COUNTY OF WESTCHESTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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REPLY MEMORANDUM FOR THE PETITIONER

I.

THE ELECTION OF REMEDIES ISSUE

The Respondents' attempt to dismiss in a footnote this Court's decision in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). This shows a

fundamental misunderstanding of what is happening in Second Circuit courts. Since the decision by the court of appeals, at least two other cases in the circuit have held that findings by the SDHR can block a claimant's access to federal court. Kirkland v City of Peekskill, 651 F.Supp. 1225 (S.D.N.Y.), aff'd, 44 F.E.P. Cases 1410 (2d Cir. 1987); Kennedy v. General Motors Corp., 664 F.Supp. 122 (S.D.N.Y. 1987). Moreover, the district courts in these cases have indicated that the mere filing of a charge with SDHR is an irrevocable election of remedies:

> the New York State Court of Appeals has since held that the very filing of a complaint with the [SDHR], even without any action on the part of the agency, constitutes a binding election of remedies which 'precludes the plaintiff from commencing an action in court based on the same incident,' ... unless the complaint is dismissed on the grounds of

> administrative convenience .... Hence, the [SDHR's] dismissal of [plaintiff's] complaints was final and entitled to preclusive effect.

651 F.Supp. at 1230 n.2; Accord, 664 F.Supp. at 127 n.9.

This has serious implications for the approximately 7000 employment complaints filed with SDHR each year. None of these individuals realize that they may have foreclosed their rights under the Reconstruction Civil Rights Acts and other non-Title VII federal statutes. None of these individuals realize that they have forfeited their rights to a jury and to compensatory and punitive damages because Title VII is their exclusive remedy. None of these individuals realize that SDHR, to which many of them have been directed, can provide no confrontation, no hearing and no relief and yet bar non-Title VII

federal claims. This result contradicts Johnson v. Railway Express Agency, Inc. and other cases in this Court and in other circuits concerning the independence of Title VII. See, e.g., Alexander v. Gardner-Denver, 415 U.S. 36 (1974); Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1986); Alexander v. Chicago Park District, 773 F.2d 850 (7th Cir. 1985); Day v. Wayne County Board of Auditors, 749 F.2d 1199 (6th Cir. 1984).

II.

THE INTERLOCUTORY JUDGMENT ISSUE

This action is not interlocutory in the sense suggested by Respondents since the Second Circuit has, in fact, rendered its final judgment. Although Mr. DeCintio may go through the proceedings in the district court, win his Title VII claim, appeal and ask the Second Circuit to reconsider on the other claims and

petition to this Court again, the delay in resolution of the issues raised will create a morass of other legal issues for pending cases which would have to be resolved. First, there are approximately 7000 claims filed and resolved by SDHR each year. Have these claimants already forfeited their rights under non-Title VII statutes by the act of filing a charge? Should they withdraw from SDHR prior to a finding? Prior to a hearing? If any of these individuals file an action under one of the Reconstruction Civil Rights Acts to avoid statute of limitations problems, can that action be voided by a "no probable cause" finding by SDHR?[1]

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[1] Johnson v. Railway Express makes it clear that filing with EEOC will not toll the statute of limitations. If, however, a charge is pending in SDHR, should the federal court decline to proceed? Or, should the court cease its proceedings once SDHR had rendered a "no

While the vast majority of these cases are now resolved in SDHR, claimants seeking legal advice in the Second Circuit must now be told that filing with SDHR may adversely affect their rights under other federal statutes. Rather then risking the administrative mechanism, some of these aggrieved persons will opt to proceed directly to court, particularly where the non-Title VII statute provides rights or remedies unavailable under Title VII.[2]

Even if the claimants were ultimately allowed to bring their claims in the future, there would be additional issues to resolve. For example, what if

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probable cause" finding since, presumably, that finding precludes non-Title VII claims in the Second Circuit?

[2] A claimant under Title VII is not entitled to a jury trial nor compensatory and punitive damages while these would be available pursuant to the Reconstruction Civil Rights Acts.

a party desires a jury trial, but is only allowed to proceed under Title VII. If the court, sitting without a jury, makes findings, is the individual bound by those findings and thus deprived of the jury trial right? If the individual is not bound by the findings, does this mean that all of the court's time and effort expended is a nullity and a simple waste of judicial resources?[3] Any delay in addressing these issues could mean a significant number of useless proceedings in the Second Circuit.

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[3] See, e.g., Keller v. P.G. County, 44 F.E.P. Cases 1065, 1067 (4th Cir. 1987)("[T]he denial of the plaintiff's demand for a jury trial of her § 1983 cause of action violated her seventh amendment right to a jury trial, and the judgment of the district court is void."); Accord, Hussein v. Oshkosh Motor Truck Co., 816 F.d 348 (7th Cir. 1987).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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